SUPREME COURT, U. S.

FEB 6 19

JOHN F. DAVIS, CL

In the Supreme Court of the United States

OCTOBER TERM, 1968.

No. 1023

ROBERT E. RATH,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals for the Sixth Circuit.

WILLIAM J. MACDANIELS,
819 Spitzer Building,
Toledo, Ohio 43604,
Attorney for Petitioner.

BERNARD J. STUPLINSKI,
United States Attorney,

JOHN G. MATTIMOE,
Assistant United States Attorney,
212 U. S. Courthouse,
1716 Spielbusch Ave.,
Toledo, Ohio 43624,
Attorneys for Respondent.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

TABLE OF CONTENTS.

Opinions Below ---------- 1

Statement of Jurisdiction ---------- 2

Questions Presented ---------- 2

Constitutional and Statutory Provisions Involved -- 3

Statement of the Case ---------- 3

Reasons for Allowance of the Writ ---------- 5

Conclusion ---------- 6

Appendix:

1. Judgment of District Court, December 11, 1967 7
2. Judgment of United States Court of Appeals for the Sixth Circuit, filed January 8, 1969 -- 8
3. Excerpts from Transcript of Trial. Examination of Witness Schiller ---------- 9
4. Charge of the Court to the Jury ---------- 12
5. Photo-copies of Exhibit No. 328 (Under separate cover because of size).

TABLE OF AUTHORITIES.

Case.

United States vs. Johnson, 319 U. S. 503 ---------- 5

Constitution and Statutes.

Constitution of the United States, 16th Amendment 3

28 U. S. C. Section 1254(1) ---------- 2

28 U. S. C. Section 7201 ---------- 3

In the Supreme Court of the United States

OCTOBER TERM, 1968.

No. _____.

ROBERT E. RATH,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals for the Sixth Circuit.

Petitioner, Robert E. Rath, respectfully petitions that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit filed January 8, 1969, affirming the verdict of conviction by a jury to eight counts of income tax evasion reached on November 7, 1967, in the United States District Court at Toledo, Ohio and entered as a judgment on December 11, 1967.

OPINIONS BELOW.

On November 7, 1967, a jury found the defendant guilty of eight counts of income tax evasion in the District Court for the Northern District of Ohio, Western Division in Toledo, Ohio, and Judgment was entered December 11, 1967. (Appendix 1.)

On January 8, 1969, the United States Court of Appeals for the Sixth District filed its judgment with the

Clerk thereof and this judgment affirmed the verdict and judgment entered by the District Court in Toledo on December 11, 1967. (Appendix 2.)

STATEMENT OF JURISDICTION.

The judgment sought to be reviewed was handed to the Clerk of the United States Court of Appeals for the Sixth District on January 8, 1969.

On January 16, 1969, the United States Court of Appeals for the Sixth Circuit granted a stay of mandate to and including February 7, 1969.

The statutory provision believed to sustain the jurisdiction of the Supreme Court of the United States is 1254 (1) of Title 28 of the United States Code.

QUESTIONS PRESENTED.

Where a government exhibit, namely Government's Exhibit No. 328, purports to be a summary of specific items to be adjusted, income computations, analysis of earnings and surplus, computations of taxable incomes of two corporations for several years, in which corporations defendant had an interest, and computations of defendant's individual income for several years (and which were the work of Michael C. Schiller, Technical Adviser to the Assistant Regional Commissioner for Enforcement Activity, who was permitted to stay in the courtroom during the entire proceedings, who as the last of the witnesses for the government had personally examined, classified and interpreted all of the exhibits introduced by the government, in said exhibit) is admitted into evidence and copies thereof are passed out to the jury, does not the admission of said exhibit into evidence and its unrestricted use by the jury constitute prejudicial error?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The 16th Amendment to the Constitution of the United States is the basis of the federal jurisdiction:

Constitution of the United States of America, Amendment XVI—Income Tax.

"The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration."

Defendant was convicted of violations of Section 7201 of Title 26, United States Code:

Section 7201 of Title 26.

"7201. Attempt to evade or defeat tax.

"Any person who wilfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more that $10,000—or imprisoned not more than 5 years, or both, together with the costs of prosecution."

STATEMENT OF THE CASE.

The trial court overruled the objections of the petitioner directed to the admissibility of the testimony of 69 Government witnesses on direct examination. The basis of petitioner's objections lay in the fact that the testimony was immaterial and irrelevant. The court admitted the testimony upon the prosecution's promise to present a "summarizing" witness and thereby tie it all together.

The Government's 70th witness was qualified as an expert witness and thereafter he became the "summarizing" witness who, over the objections of the petitioner presented each of the jurors a photo-copy of his summary identified as Exhibit No. 328.

This Exhibit No. 328 was composed of highly refined abstracts of the testimony of the proceeding 69 witnesses and these abstracts were made the basis of adjustments to the income tax returns of the petitioner without regard to credibility or any other matter that the jury might have taken into consideration in evaluating or acting upon the evidence.

While it would be unfair to say that all questions of doubt were resolved in favor of the Government, let the petitioner be heard to say that few, if any, doubts were resolved in his favor.

Petitioner here was convicted on the basis of otherwise inadmissible testimony cured of its irrelevancy or immateriality by an Agent of the Internal Revenue Service, who applied said testimony to the adjustment of petitioner's income tax returns.

REASONS FOR ALLOWANCE OF THE WRIT.

The Writ should be allowed and this cause remanded for a new trial because the court in its rulings exceeded the permissible limits implicit in the rule announced in *United States vs. Johnson,* 319 U. S. 503 which held that:

> "Admission of testimony of an expert witness regarding income and expenditures of one of the accused in this case, although consisting of computations based on substantially the entire evidence in the record, held not an invasion of the province of the jury, where, in the light of the judge's charge, all issues are left to the independent, unforeclosed determination of the jury." (Head note No. 11. Discussed fully at page 519.)

The jury was permitted to hear otherwise inadmissible evidence on the one hand, and, on the other hand, was permitted to be influenced by Exhibit No. 328, which was not evidence in any sense of the word. (Appendix 3.)

Petitioner contends that even though Exhibit No. 328 is scrupulously clear of any error of commission, the composition of Exhibit No. 328 is by its very nature, a process involving the weighing, choosing and deciding of evidence and, to the extent that this is so, the province of the jury is invaded. Furthermore, the size, completeness, polished suavity and the obvious "know-how" of the completely competent author will logically affect its readers. The readers so affected could have been the jury.

It is beyond reasonable doubt that the jury was prejudiced by Exhibit No. 328 and this prejudice was not neutralized by the instructions of the court. (Appendix 4.)

CONCLUSION.

It is respectfully suggested that this case presents a problem in evidence not only vital to the petitioner but vital to every citizen of the United States in guaranteeing constitutional rights in criminal matters. This truly was a trial in which the petitioner was convicted by a mass of irrelevant testimony completely immaterial to the accusation, converted, digested and re-presented to the jury in writing by an expert witness compelling the jury to a verdict of conviction.

Petitioner prays that the judgment of conviction be reversed and the sentence revoked, or, in the alternative, to allow the Writ and remand the case for a new trial.

Respectfully submitted,

WILLIAM J. MACDANIELS,
819 Spitzer Building,
Toledo, Ohio 43604,
Counsel for Petitioner.

APPENDIX 1.

JUDGMENT AND COMMITMENT.

(Filed December 11, 1967.)

On this 11th day of December, 1967, came the attorney for the government and the defendant appeared in person by counsel.

IT IS ADJUDGED that the defendant upon his plea of not guilty and verdict of guilty by jury has been convicted of the offense of wilfully and knowingly attempting to evade and defeat Federal Income Tax, Violation Title 26, U.S.C., Sec. 7201, as charged and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Five (5) years on each of eight (8) counts to run concurrently.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

DON J. YOUNG,
United States District Judge.

APPENDIX 2.

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Filed January 8, 1969.)

Before WEICK, Chief Judge, and PECK and MCCREE, Circuit Judges.

Appellant contends primarily in this appeal that the presence of an unauthorized person in the grand jury room rendered the indictment returned by it invalid and that receipt in evidence of a summary statement prepared by an expert constituted prejudicial error. A technical violation of Rule 6(d), Federal Rules of Criminal Procedure, occurred when an attorney who was a stranger to this action unintentionally interrupted the grand jury proceedings by entering the courtroom in which they were being conducted. The record establishes that the proceedings were halted at the moment of his entrance, and were not resumed during the fifteen to twenty second period of his presence. We hold that the interruption did not invalidate the proceedings or the indictment.

The eight-count indictment charged violations of 26 U.S.C. 7201. The Government offered extended testimony and several hundred exhibits in support of the charges of violations of the Internal Revenue Code, and the summary exhibit was offered by an expert whose qualifications were not (and are not) challenged, and who was available for cross-examination. The exhibit was based upon evidence previously received and the trial judge properly instructed the jury concerning it. Under such circumstances the exhibit was properly received in evidence (*Epstein v. United States,* 246 F.2d 563 (6th Cir. 1957), *cert. denied,* 355 U.S. 868; *Barber v. United States,* 271 F.2d 265 (6th Cir. 1958)), and the record discloses no impropriety in its use.

The remaining contentions of the appellant are determined to be without merit, and accordingly,

IT IS ORDERED that the judgment of the District Court be and it hereby is affirmed.

APPENDIX 3.

EXCERPTS FROM TRANSCRIPT OF TRIAL.

EXAMINATION OF WITNESS SCHILLER.

(1239) Q. Do you have those schedules with you? A. Yes, I do.

Q. Were all these schedules prepared by you, Mr. Schiller? A. They were all prepared under my supervision. The summary schedules, which begin with schedule 1, the even numbers being the ones prepared exclusively by me. The schedules labeled 1-A or 2-A or 2-B, and so forth, were prepared by other Internal Revenue Agents under my supervision, but they were reviewed entirely by me.

Q. You checked them for accuracy? A. Yes, I did.

Q. I show you Government Exhibit 328, Mr. Schiller, and I will ask you whether this is a true copy of the contents of that Exhibit? A. This is a reproduction of my schedules, yes, sir. Some of the schedules have been reduced in size, but it is an exact reproduction.

Mr. Walker: Your Honor, the Government offers Exhibit 328 at this time.

Mr. MacDaniels: Objection.

Mr. Walker: I also request permission to distribute copies of this exhibit to the members (1240) of the Jury and to the Court and to Defense Counsel.

The Court: What is the ground of the objection?

Mr. MacDaniels: I object to its admission. I think

if you will rule on that first we can get to the second Motion.

The Court: What is the ground of the objection to its admissibility?

Mr. MacDaniels: It is not evidence.

The Court: What do you say to that, Mr. Mattimoe?

Mr. Mattimoe: It is a summary of evidence, as the witness stated, and it is his summary upon which he will base his conclusions. We have authorities if the Court desires.

The Court: It will be received.

Mr. MacDaniels: Objection.

The Court: I presume your Motion that these copies be handed to the members of the Jury is so that they can follow the discussion?

Mr. Walker: That is correct. These are exact reproductions of the schedules that will permit the Court, Defense Counsel and the members of the Jury to follow the witness' testimony.

(1241) The Court: Do you have any objection to that, Mr. MacDaniels?

Mr. MacDaniels: Yes, the Defendant objects to that.

The Court: On what grounds?

Mr. MacDaniels: It is not evidence.

The Court: Objection overruled, and the Motion will be granted. You may hand each of the Jurors a copy of the Exhibit.

Mr. MacDaniels: I would like to add to my grounds the fact that the Defendant feels this Exhibit 328 is not evidence. I would like to add the ground that it is prejudicial.

The Court: I will adhere to my ruling. It will be admitted and the Jurors can be handed copies of it so that they can follow it.

Mr. MacDaniels: To speed things up a little, at this time I would like to make a general objection to each and every question based upon Government Exhibit 328 addressed to the witness.

The Court: I will give you a general objection to each and every question.

(1242) Mr. MacDaniels: Yes, to be propounded by the Government.

The Court: All of this witness's testimony will come in over your objection and exception.

Mr. MacDaniels: Fine.

Q. Now, Mr. Schiller, referring to page one of Exhibit 328, would you describe the format of that schedule to the Jury so that they might follow your testimony? A. Yes. The format that is followed throughout, not just with page one but for clarification—is that page one is also labeled schedule one in the upper left-hand corner. Page two is a continuation of schedule one; and page three, we will take these three pages together just for clarification.

Page three is labeled in the upper left-hand corner Schedule 1-A, and in the upper right-hand corner is labeled Schedule 1-B.

Now, those three pages present a unit. Those units will be repeated as we go through the schedules 1, 2, 3 and so forth.

To start with, Schedule one and pages one, two and three will be a unit. Page one, Schedule one, is labeled a Summary Of Specific Items To Be Adjusted To Pac-Rite Industries For The Calendar Year 1960.

* * * * *

APPENDIX 4.

CHARGE OF THE COURT TO THE JURY.

(1853) It now becomes my duty to charge you as to the law in this case. While you are the sole judges of the facts and the credibility of the witnesses, your oath requires you to accept the law as it is given by the Court, and to apply that law in your deliberations. You are not permitted to change the law, nor to apply your own conception of what you think the law should be.

This particular case began with the return of an indictment by the Grand Jury. This indictment is not evidence for any purpose. The indictment is the instrument used to inform the defendant of the criminal acts with which he is charged. The fact that it was returned may not be considered as evidence or as raising any presumption against the defendant.

A plea of "not guilty" has been entered to the indictment. This plea is a denial of the charges, and puts in issue all the essential elements of the crimes charged.

Under the Constitution of the United States, one charged with crime is presumed to be innocent until proven guilty. This presumption remains with the defendant until it is overcome * * *.

* * * * *

(1873) * * * This is a criminal case. The defendant is charged under the law with the commission of a crime, and the fact that he has or has not settled the civil liability for the payment of taxes claimed to be due to the United States is not to be considered by you in determining the issues in this case, except as it may throw some light on the intent of the defendant.

There have been admitted in evidence certain exhibits variously referred to as schedules or summaries.

Strictly speaking, these exhibits are not actual evidence, but they were admitted as summaries of other evidence in the case and they are admitted only for your assistance and convenience in considering the other evidence which they purport to summarize. Exhibits of this nature are permitted where they are based upon voluminous books, records or documents already in evidence, in order to assist you in determining the ultimate facts or results shown by such books, records or documents. But you are reminded that it is the books, records and documents which are the evidence, and the summaries are admitted only to assist you in considering that evidence. For that purpose, you are entitled to consider them.

* * * * *

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1023

ROBERT E. RATH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was convicted after a jury trial of willfully attempting to evade federal income taxes, in violation of Section 7201 of the Internal Revenue Code of 1954. At his trial the prosecution introduced several hundred exhibits (Pet. 8) and numerous witnesses (Pet. 3) to prove the underlying facts, followed by a summary exhibit offered by an expert witness whose qualifications petitioner has conceded (Pet. 5, 8).

Petitioner contends that the summary and the expert's testimony invaded the province of the jury (Pet. 5). This was laid to rest in *United States* v. *Johnson,* 319 U.S. 503, 512–520; and the use of

335-448—69

expert testimony to evaluate the evidence in criminal (or other) tax cases has been standard practice ever since. In *Johnson*, it was observed that by "proper guidance" from the trial court the jury must be left free to "exercise its untrammeled judgment upon the worth and weight of testimony" (p. 519). Here, the court's instructions (Pet. 12–13) explicitly left the ultimate facts to the jury's determination,[1] and petitioner does not even attempt to show how the instructions were inadequate. He accepted them in the trial court and proposed no different instructions (R. 22b–27b, 32b–33b). Clearly there is no justification for granting certiorari in order to review the court of appeals' conclusion that (Pet. 8) "The exhibit was based upon evidence previously received and the trial judge properly instructed the jury concerning it."

Petitioner also asserts that he "was convicted by a mass of irrelevant testimony" (Pet. 6). Petitioner did not contend in the court of appeals that there was a lack of evidence to support his conviction or that evidence was admitted which should have been excluded. It is obviously too late to advance such a contention now.

---

[1] In addition, the prosecutor told the jury (R. 35b): "So Mr. Schiller [the expert witness] has assumed certain things from the evidence. If you don't reach the same finding, Ladies and Gentlemen, you can disregard item by item whichever you don't so find." "R." references are to the Appendix to the Government's brief in the court of appeals.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

MARCH 1969.

U.S. GOVERNMENT PRINTING OFFICE: 1969